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Opinion Committee

Hon. Daniel C. Morales
Attorney General
Supreme Court Building
P.O. Box 12548
Austin, TX 78711-2548

Attn.: Opinion Committee

Re: Necessity for disclosure of public utility subscriber information pursuant to Texas Open Records Act.

Dear Sir:

Pursuant to § 402.043, Texas Government Code, I hereby respectfully request an opinion of the attorney general as to whether § 6252-17a, V.A.T.C. (the Texas Open Records Act) would require disclosure of computerized public utility subscriber information, if the Harris County Justice Information Management System (J.I.M.S.) were to obtain, on a regular basis, a utility company's computer data storage tapes containing such information.

Investigators and prosecutors employed by this office, and other Harris County law enforcement officers, frequently seek assistance from the Houston Lighting and Power Company (H.L. & P.), with regard to the identity of persons residing at particular addresses and other information regarding those persons. Because of the frequency of such requests, this office has discussed with H.L. & P. the possibility of regularly obtaining computer data storage tapes containing that subscriber data, for entry into and retrieval from the J.I.M.S. computer system. One potential difficulty in obtaining an agreement to permit such access is the possibility that the subscriber information would thereafter become available to members of the public under the Open Records Act.

H.L. & P. sells its subscriber information to various businesses. The value of the entire contents of their computer's memory containing subscriber information is estimated at $ 227,000.00, and print-outs of the names and addresses of subscribers can be purchased at the rates of $ 700.00 per month or $ 50.00 per 1000 entries. H.L. & P. cannot and will not provide this information to this office if it will thereafter become available to the gen-

eral public upon payment only of the copying and retrieval costs authorized by the Open Records Act.

This office believes that this public utility subscriber information, once in the possession of J.I.M.S., would be exempt from compelled disclosure under the Act pursuant to subsections 3(a)(4), 3(a)(8) and 3(a)(10) thereof.

Subsection 3(a)(10) exempts from compelled disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The attorney general previously has noted that § 3(a)(10) is patterned after § 552(b)(4) of the federal Freedom of Information of Act, and that the test for determining whether commercial or financial information is excepted under § 552(b)(4) is whether:

> disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C.Cir. 1974). Therefore, the attorney general has held that information may be withheld under § 3(a)(10) of the Open Records Act if it meets either of the two National Parks standards. Open Records Decisions Nos. 406 (1984); 309 (1982).

In the instant case, the information in question meets both of those standards. First, H.L. & P. cannot and will not provide the data sought by this office if the information stored in its computer system will become publicly available under the Act, hence the disclosure of that information under the Act would greatly impair the State's ability to obtain access to it. In other words, if it were to be determined that the information will be subject to disclosure under the Act upon its provision to the J.I.M.S. system, this office and other investigative agencies will be forced to continue to seek the information from H.L. & P. employees in a time-consuming, laborious case-by-case fashion.

Second, if the data is provided to J.I.M.S. as proposed, and if the information becomes subject to disclosure under the Act, substantial harm to the competitive position of H.L. & P. would occur, since its share of the market for subscriber information lists would be eradicated. It is common knowledge that there is an actual competitive market for lists of individuals to be used for direct mail and telephone solicitation marketing and other simi-

lar purposes, see Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979), and Open Records Decision No. 309 (regarding requirement of actual competition), and it is obvious that H.L. & P.'s competitive position would be drastically harmed by the government providing for free what previously has been sold for profit.

Under § 3(a)(4), this office may withhold "information which, if released, would give advantage to competitors or bidders." For the same reasons previously discussed with regard to § 3(a)(10), compelled public disclosure of the information which H.L. & P. has successfully marketed would obviously give substantial advantage to their competitors in that market, which would then possess similar lists not subject to disclosure upon payment of mere costs of retrieval and copying.

Finally, if the data were to be delivered to J.I.M.S., the H.L. & P. subscriber information would constitute, under § 3(a)(8), the "records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution." Once entered in the J.I.M.S. system, it is contemplated that access to the data in question would be restricted to appropriate Harris County law enforcement agencies for legitimate law enforcement purposes.

It is still the position of this office that the attorney general's office previously misconstrued § 3(a)(8) in appending to it a proviso that the information to be withheld thereunder must, if disclosed, "unduly interfere with law enforcement." When asked to reconsider the decisions setting out that construction of § 3(a)(8), the attorney general's office has argued that application of the "undue interference with law enforcement" proviso is somehow compelled by the opinion in Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). It is respectfully suggested that the vague and erroneous dicta in the Pruitt decision does not require any such construction of the Act, for the reasons previously advanced by this office. Furthermore, it may be noted that the examples of "undue interference with law enforcement" frequently suggested by the attorney general's office appear to have been borrowed almost verbatim from the federal Freedom of Information Act, 5 U.S.C. § 552; but that Act expressly limits the analogous federal "law enforcement exception" set out in subsection (b)(7) to materials which fall under six enumerated categories, including one for materials which, if produced, "could reasonably be expected to interfere with enforcement proceedings." Our Open Records Act contains no such limitation on the broad scope of the statutory "law enforcement exception," and there is simply no justification for deviation from

the plain and unambiguous wording of the Texas statute. It is a commonplace principle of statutory construction that "[t]here is no room for construction when the law is expressed in plain and unambiguous language, and its meaning is clear and obvious"; in such a case, the "law will be applied and enforced as it reads ..." 67 Tex.Jur.3d, "Statutes," § 86, pp. 641-643. The law enforcement exception in the Open Records Act plainly applies to all internal records of law enforcement agencies, and there is no ambiguity which might justify imposition of a limiting construction.

In any case, compelled disclosure of the computerized subscriber information to be obtained from H.L. & P. would cause substantial and undue interference with the law enforcement functions of this and other participating offices, in that it would result in the loss of access to the desired data storage tapes and a return to cumbersome, case-by-case requests for needed information. Harm to the prospects of future, continued cooperation of witnesses has been cited by the attorney general's office as an example of "undue interference with law enforcement" permitting non-disclosure of records within the possession of a law enforcement agency. See, e.g., Open Records Decision No. 329 (1983).

For the foregoing reasons, this office respectfully requests that the attorney general find that the subscriber information contained upon data storage tapes to be provided by H.L. & P. pursuant to the pending proposal would not be subject to compelled disclosure under the Open Records Act.

Yours sincerely,

JOHN B. HOLMES, JR.
District Attorney

JBH/WJD/bd